UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IAN POLLARD, on behalf of himself and all others similarly situated, Plaintiffs, v. REMINGTON ARMS COMPANY, LLC, et al., Defendants.	Case No. 4:13-cv-00086-ODS

BRIEF OF *AMICI* COMMONWEALTH OF MASSACHUSETTS, DISTRICT OF COLUMBIA, AND THE STATES OF HAWAII, MAINE, MARYLAND, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND AND WASHINGTON IN SUPPORT OF OBJECTIONS TO CLASS SETTLEMENT

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I. STATEMENT OF INTEREST

The undersigned Attorneys General[1] are their respective states' chief law enforcement or chief legal officers. Their interest in this matter arises from two separate but related responsibilities.

First, the Attorneys General have an overarching responsibility to protect their states' citizens, including on important matters of public safety and welfare. That duty is actuated by this settlement because there are potentially as many as 7.5 million defective rifles at issue, each of which is subject to unintended firing without a trigger pull. As set forth below, there are important questions about whether the relief proposed in the settlement will continue to leave citizens vulnerable to personal injury, death, or property damage.

Second, the undersigned have a responsibility to protect consumer class members under the federal Class Action Fairness Act of 2005 ("CAFA") which envisions a role for Attorneys General in the approval process of class action settlements even though they are neither class members nor parties. 28 U.S.C. §§ 1332, 1453 and 1711-15. CAFA requires that Remington, as a class action defendant, provide notice of the terms of settlement to the Attorney General of each state. 28 U.S.C. § 1715. The legislative history of CAFA establishes "that notice of class action settlements be sent to appropriate state and federal officials … so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens." S. Rep. No. 109-14, at 5 (2005), 2005 U.S.C.C.A.N. 3, 6. *See also id.* at 34 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements").

[1] References to Attorneys General include the Attorneys General of the Commonwealth of Massachusetts, the District of Columbia, and the states of Hawaii, Maine, Maryland, New York, Oregon, Pennsylvania, Rhode Island and Washington, as well as the Executive Director of the Office of Consumer Protection for the state of Hawaii.

Case law also recognizes this role of the Attorneys General. *See, e.g., Figueroa v. Sharper Img. Corp.*, 517 F. Supp. 2d 1292, 1301 n.9 (S.D. Fla. 2007) (noting role of Attorneys General in class settlement approval process); *True v. Am. Honda Mtr. Co.*, 749 F. Supp. 2d 1052, 1082 (C.D. Cal. 2010) (discussing the views of state Attorneys General with respect to a class action settlement grounded in products liability claims). Here for the reasons discussed below, the settlement fails fundamental requirements of fairness and fails to adequately protect public safety.

II. INTRODUCTION

The Attorneys General write as *amici* in support of the objectors in this matter because we believe that the settlement *should not* be approved. While the objections touch on many issues, we write, in particular, to address concerns about public safety, the scope of the release, and whether the requisites for class certification have been met. That we do not extensively address other important issues raised in the objections should not be taken as an indication that we believe those objections lack merit.

The settlement purportedly seeks to resolve a serious consumer product safety class action involving Remington rifles that are manifestly unsafe for normal use. The defects, which cause Remington rifles to fire without a trigger pull, have been known for decades. Many serious personal injuries have been litigated or otherwise reported. As the Eighth Circuit Court of Appeals recently noted, Remington does not truly dispute the existence of the defect: "indeed, Remington itself acknowledged that at least 20,000 rifles it manufactured prior to 1975 were susceptible to inadvertent discharges when the safety lever was moved from the safe position to the fire position without the trigger being pulled." *O'Neal v. Remington Arms Co., LLC*, 817 F.3d 1055, 1060 (8th Cir. 2015). Remington's admission may seriously underestimate the problem, particularly since field conditions, over-lubrication, and other external factors can contribute at any time to the likelihood that the defect will lead to an unintentional firing.

Despite Remington's awareness of the defect, there has been no meaningful remediation. In the last four years, the company has received well over 2,000 complaints from consumers who assert that their Remington rifles fired without the trigger being pulled. The vast majority of these complaints are about rifles manufactured with the Walker trigger mechanism that is at the heart of the Plaintiffs' original Complaint.

Because the main purpose of the proposed settlement is to fix a potentially dangerous trigger defect in exchange for a release, the low rate of claims by consumers makes the settlement untenable.[2] In light of the low claims rate, not enough defective guns are likely to be retrofitted either to make the settlement consistent with public safety or to justify a broad release of consumer claims. The Attorneys General believe that one of the reasons for the low claims rate is that the settlement notices do not meet standards, grounded in state law, governing the duty to warn and analogous regulatory standards applicable to recalls of potentially dangerous consumer products. The notices fail to convey that correction of the defect is urgent or that failure to replace the trigger could have life-threatening consequences.

Under the common law of torts in many states, Remington, as the manufacturer of an unreasonably dangerous or defective product, has an affirmative duty to warn both its known customers and third parties who may have acquired the rifles at issue as indirect purchasers. *See* Restatement (Third) of Torts, § 10: Products Liability (1998) (Third Restatement). *See also, e.g.*,

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[2] Although the claims period will remain open if the settlement is approved, claims filed to date are shockingly low. A group of state Attorneys General have asked, on a number of occasions, that counsel for the parties provide them with updated claims information, including a breakdown of claims for retrofit and claims for settlement coupons. Counsel has declined to provide this information. As this brief was being filed, Plaintiffs reported that 19,400 claims have been made. ECF. No. 174, p. 3. This represents claims with respect to approximately 0.26% of the 7.5 million guns at issue in this case.

Lewis v. Ariens Co., 434 Mass. 643 (2001) (adopting restatement); *Matter of New York City Asbestos Litig.*, 27 N.Y.3d 765, 788-89 (2016). The notices provided here fail to meet applicable standards grounded in the prophylactic importance of the common law duty to warn. *See* § IV.A, *infra*. Moreover, the notice and recall plan proposed in the settlement fall far short of recall-related standards for notice, repair, or replacement established for other potentially dangerous consumer products by agencies such as the Consumer Project Safety Commission ("CPSC"). *See* § IV.B, *infra*. While these standards do not directly apply to defective rifles, they provide useful guidance, based on experience, about what constitutes a defect that requires a recall, and about the clarity with which consumers should be informed of the risk of using a potentially dangerous product.

While the undersigned states encourage Remington to act responsibly, even in the absence of a settlement, by retrofitting the rifles for the small number of claimants who seek that relief after receiving notice in this matter, the Court should reject the settlement in its entirety because those repairs are insufficient consideration for the overbroad release of claims related to unrepaired guns. *See* § IV.C, *infra*. Moreover, the parties should not be allowed to gloss over the significant differences in applicable state law that may defeat predominance and adequacy under Fed. R. Civ. P. 23. Binding precedent protects the millions of class members whose rights are controlled under the law of a state other than Missouri. The inappropriateness of certifying the class and subclasses at issue here, because of the unaddressed disparities in the value of state law claims, prevents approval of the settlement. *See* § IV.D, *infra*.

The settlement—with its limited benefits to consumers, its failure to meet basic public safety concerns, its overbroad release, and its failure to meet basic requirements of Rule 23 when applied to relevant state law claims—impedes, rather than advances, remediation of an important, and potentially lethal, trigger defect. It should not be approved.

III. FACTUAL BACKGROUND

A. Remington Has Long Known That Its Triggers Are Defective.

Dozens of publicly available internal corporate documents, the production of which has been compelled in various personal injury cases, demonstrate that Remington has had actual knowledge of the defects in the triggers at issue in this proposed settlement for many years.[3] Those documents show that Remington has long been aware of the potential for its rifles to fire when the trigger is not pulled, when the safety is turned on or off and when the rifles' bolts are opened or closed. In fact, publicly available deposition testimony and documents suggest that Remington has been aware of the potential defect since approximately 1948 yet, nonetheless, declined to improve its trigger design, recall its rifles, or properly warn its customers. *See* Decl. of David Bolcome ("Bolcome Decl."), att. hereto as App. A, Ex. 8.a–8.l. In the ensuing nearly 70 years, there have been scores of claims that accidental firings of Remington rifles have caused deaths, other personal injuries, and property damage.[4] There are potentially as many as 7.5

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[3] In order to avoid burdening the Court, only a small representative portion of those documents are attached to the supporting declarations to this brief. Additional similar documents are in the public record in federal court cases. *See, e.g., O'Neal v. Remington Arms Co., LLC, et al.,* No. 4:11-cv-04182-KES (D.S.D. Feb. 2, 2011) at ECF. Nos. 26, 27, 32, 48, 49, 51, 61, 63, 65, 74, 83; *See v. Remington Arms Co., Inc*., No. 3:13-cv-01765-BR (D. Or. Oct. 4, 2013) at ECF. Nos. 25, 35. Many of the relevant publicly available internal corporate documents recently have been assembled on-line in a database maintained by the advocacy group Public Justice: *See* Remington Rifle Trigger Defect Documents (January 11, 2017) http://www.remingtondocuments.com/. Still others have been provided to the Court by Objector Richard Barber. *See* ECF No. 157.

[4] Reporting by CNBC has cataloged portions of the relevant material, including some of the resulting tragedies. *See* Gunfight: Remington Under Fire: A CNBC Investigation (CNBC television broadcast Oct. 15, 2010), (January 11, 2017) http://www.cnbc.com/remington-under-fire/.Other more recent reports too numerous to list here are on CNBC's website.

million defective rifles at issue. *See* Decl. of Sarah Petrie ("Petrie Decl."), att. hereto as App. B, Ex. 1 (email from Remington counsel).

Until 2006, Remington employed an unusual two-piece trigger mechanism typically referred to as the "Walker Fire Control Trigger." First Amend. Class Action Compl., ECF NO. 90, at ¶¶ 36–7. The Walker Fire Control Trigger was first used at Remington in 1946, and by 1948 Remington was apprised of the defect, but declined to change its design. *Id*., Bolcome Decl., Ex. 8.j–8.l. By the mid-1970s, documents show that Remington had actual knowledge, through customer complaints and its own testing, that misalignment of the pieces of the trigger, or debris lodged in the trigger mechanism, could lead to a faulty connection between the two pieces that prevented the trigger from moving back into its resting position. Bolcome Decl., Ex. 8.a–8.i. In those circumstances, the rifle could fire without a trigger pull when other normal actions were taken, including turning the safety from off to on or vice versa, and manually opening or closing the bolt. *Id*., Ex. 8.a–8.d. Over many years, Remington received many complaints about its rifles firing even when the trigger was not pulled. *Id*., Ex. 8.e–8.g. In that period, Remington also became aware that build-up of certain kinds of commonly used lubricants on the trigger mechanism could lead to the trigger sticking and the rifle going off without a trigger pull. *Id*., Ex. 8.b–8.c.

B. Remington Knows Or Should Know That *All* Of The Rifles Subject To The Settlement Are Unreasonably Dangerous Both To Their Owners And To The General Public.

A firearm that fires a bullet without the trigger being pulled is perhaps the quintessential example of a dangerously unsafe product. Remington has admitted that some of the firearms that are the subject of this litigation are prone to unintentional discharges. *See, e.g.*, Fourth Amend. Settlmt. Agmt., ECF No. 138, at 3 ("Fourth Amend.") ("Plaintiff's Counsel were informed by

Remington, and through their own independent investigations, of certain limited conditions which could potentially cause recently manufactured Model 700 and Model Seven bolt-action rifles containing X-Mark Pro trigger mechanisms to discharge without a trigger pull”). *See also O’Neal, supra*, at 1060.

However, Remington continues to deny that “the design of the Walker trigger mechanism or other trigger mechanisms utilizing a trigger connector are defective and can result in accidental discharges without the trigger being pulled.” Fourth Amend., ECF No. 138, at 5. Both the documents described above in § III.A and Remington’s internal record of customer complaints belie this denial. In a 149-page spreadsheet, Remington’s internal files demonstrate that it has actual knowledge of thousands of consumer complaints that its rifles fired without a trigger pull *in just the last four years*, including those rifles with the Walker trigger mechanism that are the subject of this proposed settlement. *See* Petrie Decl. at ¶ 7. In the last four years, Remington has received approximately 1,900 such reports for the 11 different types of rifles comprising Settlement Class A (Walker trigger) and approximately 400 such reports for the two types of rifles comprising Settlement Class B (X-Mark Pro trigger). *Id*. at ¶ 8. While these complaints vary in reporting the type of malfunction—including “Fired on Safe Release,” “Fired on Bolt Closing,” “Unexplained Discharge – No Mention of Safety Position,” “Safety not working properly,” “Fired on Bolt Opening,” and “Fired with safe ON”—they all share the same potentially deadly commonality: that the rifles discharged without a trigger pull. *Id*.[5]

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[5] Additional examples of complaints about trigger malfunction are in the record of this matter. *See, e.g.,* Frost Aff., ECF No. 150-3; Edwards Ltr., ECF No. 169; Stringer Ltr., ECF No. 149. The latter two letters illustrate the type of compelling stories about the consequences of the Remington rifles’ defect that abound in court filings and public records. The Court is also undoubtedly aware of the compelling facts of Richard Barber’s personal loss related to the defect and of his laudable work seeking to hold Remington to account. *See, e.g.*, ECF No. 157. The victims of these tragedies who have come forward in this matter represent just the tip of a very large iceberg. *See O’Neal*, at 1060.

C. Remington Already Has Open Recalls Of Many Of The Rifles At Issue In Which Non-Participants Will Not Release Claims.

In its proposed settlement, Remington offers Settlement Class B(1) — "all current owners of Remington Model 700 and Model Seven rifles containing an X-Mark Pro trigger mechanism manufactured from May 1, 2006 to April 9, 2014" — a retrofit to fix the defect in their trigger. Fourth Amend. at ¶ 36. But this remedy is already available. These class members may participate in a voluntary recall that replaces the triggers for these same firearms.[6] Under this existing recall, consumers do not release any claims against Remington.

Moreover, according to Remington's website, certain Model 600 and Model 660 rifles may currently be returned to Remington under a so-called "Safety Modification Program" in order to remedy a problem identified by Remington in the 1970's whereby the "safety and trigger could be manipulated in a way that could result in an accidental discharge."[7] By contrast, the proposed settlement does not allow for a fix of these rifles; rather, it only provides owners of these firearms with a voucher for $12.50. Fourth Amend., ECF No. 138, at ¶ 53(c).[8]

D. The Reported Claims Rate Is Unreasonably Small.

The Frost Objection lays out in great detail the many problems with the notice plan in this settlement that has resulted in a paltry—indeed, almost meaningless—number of claims filed: one tenth of one percent. Frost Obj., ECF No. 150, at 9–27. See Note 2, *supra*. For any product, a claims rate this low is troubling, even if it is ultimately increased by as much as ten or twenty times while the settlement is pending. But for rifles whose dangerousness is real, well-documented, and pervasive, the anticipated minimal number of retrofits is potentially deadly. If approved, millions of the 7.5 million firearms that have the capability of firing without a trigger pull would remain unfixed – quite literally loaded guns that might go off accidentally at any time.

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[6] *See* Product Safety Warning and Recall Notice (Jan. 11, 2017), https://xmprecall.remington.com/.

[7] *See* Remington Model 600 & 660 (Jan. 11, 2017), https://www.remington.com/support/safety-center/safety-modification-program/remington-model-600-660.

[8] There is also an open recall for certain Model 710 rifles manufactured in 2002 that does not appear to include a release. *See* Model 710 Product Safety Warning and Recall Notice (Jan. 11, 2017), https://www.remington.com/support/safety-center/model-710-product-safety-warning-and-recall-notice.

IV. ARGUMENT

A. STATE LAW IN MANY JURISDICTIONS REQUIRES A MANUFACTURER TO COMPREHENSIVELY WARN OF DANGEROUS DEFECTS FOR PROPHYLACTIC PURPOSES. THAT DUTY TO WARN IS NOT MET BY THE SETTLEMENT NOTICE AND THE RESULTING STATE LAW DUTY TO WARN CLAIMS CANNOT BE RELEASED.

The economic loss to class members that is purportedly addressed in the proposed settlement cannot practically be separated from the unreasonable risk of injury or death posed by the continued use of rifles with potentially defective triggers. That risk, of course, is not just to rifle owners, but also to members of the public who may be in harm's way if a rifle accidentally fires. To address this concern, under many states' laws, Remington has an obligation to adequately warn of the risk associated with continued use of its potentially defective rifles, a duty that cannot be released in a class action settlement prior to compliance with that obligation. The settlement notice and notice plan in this matter do not come close to meeting the applicable legal standards for warning in many jurisdictions. The Court should not approve the settlement and thereby permit these important public safety-based claims to be released.

1. States Have Implemented Variants Of The Duty To Warn In Order To Prevent Injuries Associated With Hidden Dangers Of Unsafe Products.

"Although different states apply the doctrine differently, the vast majority of courts recognizing post-sale failure to warn claims agree that a claim arises when the manufacturer or seller becomes aware that a product is defective or unreasonably dangerous after the point of sale and fails to take reasonable steps to warn consumers who purchased the product." *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521, 541-42 (Tenn. 2008). The purpose of creating the liability is not just to provide a remedy for failure to warn, but also to deter manufacturers and sellers from hiding a defect that could lead to personal injury or property damage. *See, e.g., Brown v. Bay State Abrasives,* 821 S.W.2d 531, 533 (Mo. App. 1991) (the intended function of the duty to warn is to reduce risk).

The substantial number of documented incidents of Remington rifles inadvertently firing without a trigger pull places Remington under an obligation to warn rifle users of the potential for harm. *See* §§ III.A, B, *supra; O'Neal*, 817 F.3d 1055, 1060 (8th Cir. 2015) (for history of harm). S*ee also Lovick v. Wil-Rich*, 588 N.W.2d 688, 695 (Iowa 1999) (post-sale warning must be given if the risk of harm outweighs the costs of identifying users and communicating the warning). Indeed, with respect to the X-Mark Pro trigger mechanisms, the existing voluntary recall makes clear that Remington agrees that it has an obligation to warn its users. Because the Walker trigger also has a history of accidental firings without a trigger pull, Remington cannot credibly argue that the similar risk of substantial injury or death does not create an equal obligation to warn users.

States have adopted a large number of nuanced variants of the post-sale duty to warn, many of which are collected in the citations accompanying the Third Restatement, § 10.[9] Many of the state decisions make clear that the scope of the duty is fact dependent. *See, e.g.*, *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1314-15) (Kan. 1993) (collecting cases, noting that Kansas has adopted a post-sale duty to warn of defects that may be life-threatening, and adopting a fact-dependent balancing test); *Arnold v. Ingersoll Rand Co*., 834 S.W. 2d 192, 196 (Mo. 1992) ("general tendency is a case-by-case approach").[10]

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[9] The Restatement (Third) of Torts: Prod. Liab. § 10 (Third Restatement) holds a manufacturer liable for failing to warn consumers of a defect discovered after the sale of a product if:

(i) the manufacturer knows or should know "the product poses a substantial risk of harm to persons or property;" and

(ii) "those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

(iii) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(iv) the risk of harm is sufficiently great to justify the burden of providing a warning."

2. The Settlement Notice Does Not Adequately Describe The Defect Or Warn Owners Not To Use An Unrepaired Gun.

Plainly, to be effective, a warning must adequately convey the nature of the defect and the magnitude of the risk. *Moore v. Ford Mtr. Co*., 332 S.W.3d 749, 762 (Mo. 2011) (noting that Missouri, "like several other states," presumes that "a warning will be heeded" if it adequately conveys the risk). It is in pursuit of this purpose that manufacturers of defective products are obliged to provide warnings that reasonably alert users to latent dangers. To be reasonable, the warning must appropriately emphasize the danger through its prominent placement in the notice, using sufficient language to convey the warning and impress its importance upon the average recipient of the warning. *See, e.g., Siems v. Bumbo Int'l Trust*, 13-0796-CV-W-ODS, 2014 WL 4954068, at *3 (W.D. Mo. Oct. 2, 2014); *Brown*, 821 S.W.2d 531, 533 (Mo. App. 1991). "[I]mplicit in the duty to warn is the duty to warn with a degree of intensity that would cause a reasonable man to exercise for his own safety the caution commensurate with the

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Third Restatement § 10 (1998). A growing majority of states recognize some form of a post-sale duty to warn. *See Rash v. Stryker Corp.*, 589 F. Supp. 2d 733, 736 (W.D. Va. 2008) (finding that Virginia would likely recognize a post-sale duty to warn and noting that many other jurisdictions have recognized this theory of liability); Third Restatement § 10, Comment a (1998). Further, Section 10 has been specifically adopted, or favorably referenced as comporting with existing state law, in at least six states: *Jones v. Bowie Indus., Inc.*, 282 P.3d 316, 335 (Alaska 2012) (Alaska); *Sta-Rite Indus., Inc. v. Levey*, 909 So. 2d 901, 905 (Fla. Dist. Ct. App. 2004) (Florida); *Lovick v. Wil–Rich*, 588 N.W.2d 688, 695–6 (Iowa 1999) (Iowa); *Lewis*, 434 Mass. 643, 648-9 (2001) (Massachusetts); *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 239, 700 N.E.2d 303, 307 (1998) (New York); and *Robinson v. Brandtjen & Kluge, Inc.*, 500 F.3d 691, 697 (8th Cir. 2007) (South Dakota).

[10] As discussed below in § IV.D, these fact-based differences in state law militate against settlement approval absent choice-of-law analysis, because lack of uniformity on the scope of the duty means that the adequacy and predominance requirements of the class action rule, Fed. R. Civ. P. 23(a)(4), (b)(3), cannot be met.

potential danger." *Gracyalny v. Westinghouse Electr., Corp.,* 723 F.2d 1311, 1319 (7th Cir. 1983) (internal citations omitted).

The notices in the proposed settlement do not meet this standard. As discussed further in § IV.B below, the description of the defects in the Walker trigger (referred to as rifles with a "trigger connector") is entirely absent from most settlement notices and the settlement website. Neither the notices nor the settlement website meaningfully describe the risks associated with continued use of a rifle with a Walker trigger. *See* Fourth Amend., ECF No 138, Ex. B, C & F.

Instead, both the existence of the defect and the risk of harm are prominently denied. The Long Form Notice states:

> The class action lawsuit claims that trigger mechanisms with a component part known as a trigger connector are defectively designed and can result in accidental discharges without the trigger being pulled. … Defendants deny Plaintiffs' allegations and claim that the design of the firearms is not defective and that the value and utility of these firearms have not been diminished.

See Id, Ex. B, at pp. 1-2. Similarly, the Reminder Notice says only, "The settlement was entered following allegations that Remington firearms can fire without a trigger pull. Remington denies those allegations with respect to the trigger connector but is offering trigger replacements to ensure continued satisfaction for its valuable customers." *Id.*, Ex. F. The Short Form Notice is no better. *Id*, Ex. C. Plainly, Remington has had three bites at the apple and has offered no warning at all.

Because of these deficiencies, it is highly unlikely that recipients of one or more of the settlement notices will grasp that they and the public *may be at risk of injury or death* if faulty trigger connectors are not replaced or retrofitted. The fact that future claims for death or injury are exempted from the proposed release does not excuse Remington's duty to warn now, and will be of little comfort to later-injured class members or members of the public who might have avoided injury if Remington provided adequate notice of the danger. Ultimately, the settlement cannot be approved because Remington has not discharged its obligation to warn in a manner consistent with the release of "duty to warn" claims. *See* § IV.C.

B. THE SETTLEMENT NOTICES DO NOT MEET ANALOGOUS STANDARDS FOR RECALLS OF POTENTIALLY DANGEROUS CONSUMER PRODUCTS THAT ARISE IN OTHER CONTEXTS BECAUSE THEY FAIL TO ADEQUATELY DESCRIBE BOTH THE NATURE OF THE DEFECT AND ITS POTENTIAL CONSEQUENCES.

1. Effective Recall Notices Include Complete Information About The Defect And A Description Of The Potential Risks Of Continued Use.

Clear standards exist for recalls of potentially dangerous consumer products in other contexts that apply by analogy to the dangerous trigger defect at issue here. For the thousands of consumer products used in and around the home, in schools, and in recreation— such as toys, cribs, appliances, power tools, and household chemicals—the federal Consumer Product Safety Commission ("CPSC") is charged with protecting the public from unreasonable risks of injury or death. CPSC's work to ensure the safety of consumer products has contributed to a "decline in the rate of deaths and injuries associated with [such products] over the past 40 years."[11]

On January 1, 2010, the CPSC issued a final rule establishing guidelines and requirements for mandatory recall notices as required by § 214 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"). *See* Guidelines and Requirements for Mandatory Recall Notices, 16 C.F.R. § 1115 (2010). The rule prescribes the information that, under CPSIA, must appear on mandatory recall notices ordered by the Commission or a United States District Court under certain sections of the Consumer Product Safety Act. *Id*. The rule also contains the Commission's guidelines for additional information that the Commission or a court may order to

[11] United States CPSC, About CPSC (Jan. 11, 2017), https://www.cpsc.gov/About-CPSC.

be included in a mandatory recall notice. *Id*. The purpose of the rule is to ensure that "every recall notice effectively helps consumers and other persons to: (1) identify the specific product to which the recall notice pertains; (2) understand the product's actual or potential hazards… and the information relating to such hazards; and (3) understand all remedies available to consumers concerning the product...." 16 C.F.R. § 1115.23. Although the rule does not apply here,[12] its standards, and the rationale for them, are instructive.

2. Settlement Communications to Class Members Lack Two Key Descriptions Mandated in the Consumer Product Recall Context: A Description of the Product Hazard and A Description of the Incidents, Injuries, and Deaths.

The CPSC rule lays out content guidelines applicable to recall notices. Under the CPSC rule, an effective recall notice includes, among other things, two key descriptions: (1) a description of the "substantial product hazard" and, (2) a description of the "incidents, injuries, and deaths associated with the product conditions or circumstances giving rise to the recall…." 16 C.F.R. § 1115.27(f), (m).

The product hazard description must clearly and concisely describe a product's "actual or potential hazards" resulting from the "condition or circumstances giving rise to the recall." 16 C.F.R. § 1115.27(f). It must enable consumers to "readily identify" the "reasons that a firm is requiring a recall" and enable "consumers and other persons" to "readily identify and understand" the "risks and potential injuries or deaths associated with the product conditions and circumstances giving rise to the recall." *Id*.

Equally important, under the CPSC rule, an effective recall notice must contain a "description of the incidents, injuries, and deaths." 16 C.F.R. § 1115.27(m). Specifically, this means a "clear and concise summary description" of "all incidents (including but not limited to, property damage) injuries and deaths associated with the product conditions or circumstances giving rise to the recall, as well as a statement of the number of such incidents, injuries, and deaths." *Id*. The description must be one which enables "consumers and other persons" to "readily understand" the "nature and extent of the incidents and injuries and must "state the ages of all persons injured and killed." *Id*.

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[12] Unlike other consumer products, rifles are not subject to regulation, including safety reporting requirements, by the CPSC. *See* Consumer Product Safety Commission Improvements Act, § 3(e), 90 Stat. 503, 504 (1976).

a. *CPSC recall notices and recall notices issued by manufacturers routinely contain the required descriptions.*

In light of this regulatory framework, the CPSC and recalling manufacturers routinely issue notices containing the CPSC-mandated descriptions of both the hazard and the resulting incidents. The specifics of these descriptions are instructive, both because they demonstrate how few injuries are typically required before a notice is issued, and because of the clear and direct nature of the warnings. Examples include:[13]

- ***Mission Archery MXB Crossbow,*** *Recall Date: Jun., 3, 2014; No: 14-197*: **"**The crossbow can fire an arrow unexpectedly without the trigger being pulled, posing an injury hazard to the user and to bystanders… Mission Archery has received three reports of the crossbow firing unexpectedly. No injuries have been reported." Petrie Decl., Ex. 2.
- ***Polaris RZR Recreational Off-Highway Vehicles,*** *Recall Date: Apr. 19, 2016; No.: 16-146:* "The recalled ROV's can catch fire while consumers are driving, posing fire and burn hazards to passengers and drivers …. Polaris has received

[13] A repository of additional recall notices can be found at the CPSC's website. *See* Recall Listing (Jan. 11, 2017), https://www.cpsc.gov/recalls/.

more than 160 reports of fires with the recalled RZR ROVs, resulting in one death of a 15-year old passenger from a rollover that resulted in a fire and 19 reports of injuries, including first, second and third degree burns." Petrie Decl., Ex. 3.

- ***Sportcraft and Wilson Batting Tee***, *Recall Date: Apr. 8, 1993; No.: 93-057*: "The washer that holds the cord may suddenly fly out of the slit when a child pulls on the ball or cord during normal use, striking a nearby player … CPSC has one report that a child was rendered legally blind in one eye after being struck by the washer from a Batting Tee." Petrie Decl., Ex. 4.

These descriptions concisely, but powerfully, convey to the consumer the reasons to take advantage of the recall or to stop using the product.

b. Settlement communications to class members lack key descriptive requirements of consumer product recall notices.

In contrast to the notices cited above, the communications to class members under the settlement lack the basic content required under the CPSC rule. The Long Form Notice, Short Form Notice, and Reminder Notice all lack a description of the substantial product hazard that would enable a consumer to "readily identify and understand" the "risks and potential injuries or deaths associated with the product conditions and circumstances giving rise to the recall." For example, the Long Form Notice states only that the Model 700 and Seven rifles containing the X-Mark Pro trigger connector could "discharge without a trigger pull under *certain limited conditions*," without describing the conditions or further elaborating. *Compare* Petrie Decl., Ex. 4 (*Sportcraft*) (specifically noting in the product hazard description that dangerous incident could occur "during normal use"). Likewise, the Short Form Notice to Class Members in this case contains the same vague statement about "certain limited conditions," without elaboration.

The Reminder Notice not only lacks the substantial product hazard description but also actively obscures the safety concerns, by calling the lawsuit an "Economic Loss" lawsuit.

In addition—and, critically, here, given the thousands of consumer complaints to Remington that are consistent with its rifles firing without a trigger pull—the notices to class members under the settlement lack any information regarding the number of incidents, injuries, and deaths. Thus, unlike the CPSC-compliant notices described above, the notices to class members under the settlement prevent class members from readily understanding the nature and extent of the incidents and injuries associated with defective trigger mechanisms.

Finally, neither of the two key descriptions—the substantial product hazard, and the number of incidents, injuries, and deaths—are provided on the instructional DVD, the "10 Commandments of Gun Ownership," which Remington is providing as a purported settlement benefit to the class members. The instructional DVD provides only generalized safety information rather than specific information relevant to the conditions that might lead to activation of the hidden defects that Remington has long known affect its trigger designs. Nor has Remington taken the additional available steps that other manufacturers have taken in the consumer product recall context to address serious safety concerns. *See, e.g.*, Petrie Decl., Ex. 3 (manufacturer Polaris agreed to voluntarily suspend sale of all affected snowmobiles and issued a "stop ride" "stop sale advisory" to consumers).

Thus, the Settlement communications to class members lack the basic content recommended in the context of consumer product safety recalls and thereby prevent class members from taking steps to protect themselves and others from grave safety risks.

3. The Settlement Provides No Direct Notice of the Defect to Many Potential Class Members.

Not only do clear standards exist for recall notices in the consumer product safety context, clear standards also exist for the type of notice considered most effective. Here, too, the settlement notice fails to meet basic standards and meaningfully provide the form of notice recommended by the CPSC in product recalls. The CPSC rule notes that a "direct recall notice" (*i.e.*, one "sent directly to specifically identified consumers") is "the most effective form of notice" and should be used not only for "each consumer for whom a firm has direct contact information" but also "when such information is [otherwise] obtainable, regardless of whether the information was collected for product registration, sales records, catalog orders, billing records, marketing purposes, loyal purchaser clubs, or other purposes." 16 C.F.R. § 1115.26(a)(4), (b)(2). In this case, the notice plan fails to meaningfully provide direct notice, when direct notice is possible. *See* Aff. of Todd B. Hilsee, Ex. 2 to Frost Obj., ECF NO. 150-3. Among other things, Remington has failed to obtain address information about purchasers available through its authorized retailers[14] and has failed to engage with states that maintain registries of firearm sales containing purchasers' addresses.[15]

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[14] Eleven states (California, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, New Jersey, Oregon, Pennsylvania, Rhode Island) require licensed dealers to maintain records of sales of all firearms with different retention periods. Examples of relevant statutes include: Cal. Penal Code §§ 11105, 11106 , 28100-28215; Conn. Gen. Stat. Ann. §§ 29-31, 29-33(e) , 29-37a(d), (f)(3); 430 Ill. Comp. Stat. Ann. 65/3(b); 720 Ill. Comp. Stat. Ann. 5/24-4; Me. Rev. Stat. Ann. tit. 15, § 455 ; Md. Code Ann., Pub. Safety §§ 5-101, 5-120, 5-145; Md. Code Regs. 29.03.01.09(D); Mass. Gen. Laws Ann. ch. 140, § 123; Mich. Comp. Laws Ann. §§ 28.422(5), 28.422a (2), 750.232; N.J. Stat. Ann. §§ 2C:58-2b, 2C:58-3h; N.J. Admin. Code §§ 13:54-1.8(b), 13:54-3.14; Or. Rev. Stat. Ann. §§ 166.412(2), 166.434; 18 Pa. Cons. Stat. Ann. §§ 6111(b)(1), (1.1), (1.4),(c), 6113(a)(5), (d), 37 Pa. Code § 33.111; R.I. Gen. Laws Ann. §§ 11-47-35(a)(2), 11-47-35.2(b). The parties did not incorporate any of these records into their direct notice plan.

[15] For example, Massachusetts registers all recent gun transfers and therefore has addresses of recent purchasers of Remington rifles included in the settlement. Mass. Gen. Laws Ann. ch. 140, §§ 128A, 129C. Although the registry is not publicly available, Remington did not inquire to determine if the Commonwealth of Massachusetts or other states would provide direct mail notice to affected gun owners, presumably at Remington's expense. Other jurisdictions that have gun registration requirements include at least Connecticut, Hawaii, and the District of Columbia. *See* Conn. Gen. Stat. Ann. §§ 53-202d(a), 53-202p(a)(1), 53-202q; Haw. Rev. Stat. Ann. §§ 134-3(a)-(b), 134-4; D.C. Code Ann. §§ 7-2502.01-7-2502.10; D.C. Mun. Regs. tit. 24, § 2305.

While CPSC rules do not apply to the settlement notice under review here, they provide relevant standards for consumer product safety defect notices grounded in common sense and intended to advance important public safety concerns. By requiring notice specific to the safety concern of the product at issue, with supporting information, consumers are more fairly warned of the risks of that product (and how to avoid them) and the likelihood of a robust response to the notice increases. Here, Remington's continued failure to acknowledge the nature of the defect, the defect's pervasiveness, and its potentially lethal consequences has likely greatly suppressed the number of rifles that will be returned to be retrofitted with a safer trigger. Indeed, given that 7.5 million rifles are at issue, the paltry claims rate is evidence of the ineffectiveness of the notice. The absence of clear information about the defect and its potential consequences also reduces the likelihood that owners of the rifles at issue are properly warned to take necessary safety precautions, even if they choose not to elect to retrofit their triggers.

C. THE RELEASE IS OVERBROAD, PARTICULARLY IN LIGHT OF THE LIMITED BENEFITS OF THE SETTLEMENT TO CLASS MEMBERS.

1. The Settlement Improperly Undermines the Personal Injury and Property Damage Claims that it Assertedly Protects.

Although the release in this matter purports to exempt personal injury and personal property damage claims, it otherwise broadly covers many of the claims that sound in tort or contract that may serve as grounds for those actions. For example, failure to warn is a common basis for a products liability action for personal injuries. *E.g.*, *In re Levaquin Prods. Liab. Litig.*, 700 F.3d 1161 (8th Cir. 2012). Similarly, breach of the warranty of merchantability is often the basis for a personal injury action, even though it sounds in contract. *E.g., Ragland Mills, Inc. v. General Mtrs. Corp.*, 763 S.W.2d 357, 360 (Mo. App. 1989). Yet the language of the release could be used by Remington to oppose future personal injury claims based on those causes of action brought by class members, whether they receive a settlement benefit or not. *See* Fourth Amend., ECF No. 138, ¶ 94 (discharging all claims "whether sounding in tort, contract, breach of warranty, … or any other claims whatsoever under federal law or the law of any state"). Even if that defense fails, a class member's failure to file a claim or to have the gun retrofitted is likely to be the basis for an attempted assumption of risk or contributory negligence defense.

Although these concerns have not been fully addressed by the parties, they are self-evident, as this Court has already recognized:

> [I]f the owner doesn't have the gun repaired and there is a subsequent accident or accidental discharge and that someone is injured or killed as a result of that discharge, then that owner may well face a contributory negligence assumption under the risk of comparative fault defense in a personal injury case.

Transcript of Evid. Hrg. Before Hon. Ortrie D. Smith (Aug. 2, 2016), p. 24, ln. 14. The view of the Attorneys General is that the limitation in the release that preserves personal injury claims is of little value if the settlement itself, by its very existence, creates a potential defense to those same claims. This is particularly true for the many class members who may not receive (or recognize that they have received) the types of non-traditional notice that are being experimented with in this case.

2. Certain Class Members Will Be Rendered Worse-off by the Settlement In Light of Existing Recall Programs; Many Others Will Receive No Benefit at All.

In light of Remington's existing recall programs as described above in § III.C, which remain available without a release of claims (or risk of a contributory negligence defense), many class members are actually rendered worse off by the settlement. Instead of the pre-settlement "Safety Modification Program" currently available to owners of certain Model 600 and 660 rifles,[16] those class members receive only the right to receive a coupon in exchange for a release of claims. Similarly, owners of rifles with the X-Mark-pro trigger can currently get their rifles fixed at any time,[17] without the potential that non-claimants will also release their claims.

Based on the preexisting recall programs, the settlement, if approved, therefore would either terminate existing legal rights, including previously promised retrofits, or would offer no additional consideration in exchange for a broad release. This sleight of hand should be rejected. *See In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (imposing costs on the class to obtain relief "that already is on offer," which "duplicates a remedy that most buyers already have received, and that remains available to all members of the putative class," does "not adequately protect[] the class members' interests."). Indeed, class actions following preexisting recalls typically don't get certified under Rule 23 in the first instance because, among other things, the action doesn't meet the superiority requirement of Rule 23(b)(3). *Waller v. Hewlett-Packard, Inc.*, 295 F.R.D. 472, 488 (S.D. Cal. 2013) (collecting and explaining relevant case law). That is especially true in a settlement context that provides little more (and possibly less) than the recall relief that was already available to class members before the settlement was reached.

Moreover, in light of the apparently low claims rate, the millions of settlement class members who either do not get notice or who do not pursue claims will get no benefit at all in exchange for their release. Some others, who do make claims, have no option for a retrofit and will receive only a coupon in the amount of $10 or $12.50 that they can apply to Remington products. Coupon settlements are heavily disfavored in federal jurisprudence. *See Redman v.*

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[16] Remington Model 600 & 660 (January 11, 2017), https://www.remington.com/support/safety-center/safety-modification-program/remington-model-600-660.

[17] *Id.*

RadioShack Corp., 768 F.3d 622, 632-33 (7th Cir. 2014) (discussing advantages to companies that pay settlement benefits in coupons). *Cf. Galloway v. Kansas City Landsmen, LLC*, 833 F.3d 969, 972-74 (8th Cir. 2016) (discussing CAFA's application to attorney's fees in class action settlements and noting potentially limited value of coupons to consumers). In ascertaining the fairness of a coupon settlement, the Court is to "consider, among other things, the real monetary value and likely utilization rate of the coupons provided by the settlement." S. Rep. No. 109-14, at 31, 2005 U.S.C.C.A.N. 3, 31. Considering these factors is necessary not only because the coupon has value only if it is used, but also because the company will undoubtedly profit when consumers add substantial value to pay for products that typically cost hundreds of dollars or more. Ultimately, coupons are effectively no consideration for the release in this settlement, because they have paltry value against the significant costs of Remington products. *See True*, 749 F. Supp. 2d 1052, 1082 (C.D. Cal. 2010) (rejecting coupon settlement in a products liability case under the CAFA standard).

Even more cynically, the settlement purports to provide a generic gun safety video as consideration for the release. As discussed above, that video provides no specific information relevant to managing or preventing a known trigger defect, and it is duplicative of information widely disseminated to gun owners in other forms. The National Rifle Association, for example, publicizes gun safety rules that are, for all intents and purposes, the same as those that Remington offers as a settlement benefit.[18] Nothing in the settlement video explains the conditions that might cause the Remington trigger defect to manifest itself or how to avoid them.

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[18] *See* NRAExplore: Discover the Possibilities, NRA Gun Safety Rules (Jan. 11, 2017) https://gunsafetyrules.nra.org.

3. The Settlement Should Be Clarified To Acknowledge That Claims By Attorneys General Are Not Precluded.

The *amici* Attorneys General also note that in their states as well as many others, the Attorney General can pursue claims under consumer protection laws. *See, e.g.,* Mass. Gen. Laws. ch. 93A, § 4.[19] Although *amici* interpret the release to preclude only future claims by individual owners of Remington rifles (and their individual successors in interest), any eventual settlement in this case should clarify that it does not release claims by attorneys general, including claims for injunctive relief or additional restitution.

D. THE CLASS CANNOT PROPERLY BE CERTIFIED HERE BECAUSE THE SETTLEMENT'S PROPONENTS HAVE FAILED TO DEMONSTRATE THAT SETTLEMENT BENEFITS ARE APPROPRIATELY CALIBRATED TO VERY DIFFERENT CLAIMS GROUNDED IN DISPARATE STATE LAW.

To be certified as a class, plaintiffs must meet all of the requirements of Rule 23(a) and must satisfy one of the three subsections of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). A settlement cannot be approved unless the class can be certified. *Id.* Notably, in *Amchem*, a product liability action, the Supreme Court affirmed the decertification of a settlement class that did not adequately address differences among the legal claims of class members. Among other things, the Court was concerned that "[cl]ass members are to receive no compensation for certain kinds of claims, even if otherwise applicable state law recognizes such claims." *Id.* at 604.

Here, the underlying class claims are entirely grounded in the unique consumer protection, contract, and tort laws of each jurisdiction in the United States. Despite this, Plaintiffs, who are citizens of only a handful of these jurisdictions, have now pled only consumer protection claims under the Missouri Merchandising Practices Act as well as generic claims for "fraudulent concealment" and "unjust enrichment." *See* First Amend. Class Action Compl., ECF No. 90.

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[19] See, for example, D.C. Code § 28-3909(a); Haw. Rev. Stat. § 480-2(A); Me. Rev. Stat. Ann. tit. 5 § 207; N.Y. Executive Law § 63(12).

Tellingly, the Amended Complaint (filed in connection with the proposed settlement) substantially *reduced* the types and extent of the claims pled, even though the ambitious settlement agreement seeks release of a much broader set of claims under the laws of 50 states, including the claims pled in the original complaint. By way of reference, the original claims included Strict Liability (Design Defect, Manufacturing Defect and Failure to Warn), Negligence, Breach of Implied Warranty of Merchantability, and several others, each pled under unspecified state laws. *See* Compl., ECF. No. 1.

Even though the latter claims have been removed from the pleading, the settlement's release makes clear that they will be discharged for the class members present in each jurisdiction, regardless of the relative merits of those claims. *See* Fourth Amend., ECF No. 138. ¶ 94. The release will discharge all claims "whether sounding in tort, contract, breach of warranty, … or any other claims whatsoever under federal law or the law of any state." *Id.* In short, everything other than certain personal injury and property damage claims are released under federal law as well the laws of all 50 states and the District of Columbia, *even though the core claim is now limited to a single consumer protection claim under Missouri law*. Most recently, in order to justify the settlement, the parties have jointly disparaged even that one remaining substantive claim: *See* "Decisions Addressing the Missouri Merchandising Practices Act Present Hurdles to Overall Success, Class Certification and Damages," Joint Supp. Br. Pursuant to the Court's Order of Dec. 8, 2015, ECF. No. 127, p. 23–7 ("Joint Supp. Br.").

The discrepancy between the limited claims now pled and the breathtaking scope of the release suggests an apparent—and improper—attempt to get around binding precedents of the Supreme Court and of the Court of Appeals for the Eighth Circuit as discussed below. Under relevant settled principles of law, Plaintiffs cannot represent class members in other jurisdictions without full analysis of the choice of law applicable to the state claims at issue or substantial proof that the applicable law of all 50 states is significantly alike. The proposed settlement must fail because the class cannot be certified.

1. The Parties Have Failed To Show That The Law Applicable To Claims Of Citizens Of Different States, Either With Or Without Subclasses, Is Sufficiently Uniform To Be Resolved With Identical Benefits.

Based on *Amchem*, the Court of Appeals for this Circuit has been clear about the standard for class certification when non-uniform state laws apply:

> The district court's class certification was in error because the district court did not conduct a thorough conflicts-of-law analysis with respect to each plaintiff class member before applying Minnesota law. The Supreme Court has held an individualized choice-of-law analysis must be applied to each plaintiff's claim in a class action. *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 822–3 (1985). There is, of course, no constitutional injury to out-of-state plaintiffs in applying Minnesota law unless Minnesota law is in conflict with the other states' laws. Therefore, we must first decide whether any conflicts actually exist. *See id.*, at 816.

In re St. Jude Medical, Inc., Silzone Heart Valve Prod. Liab. Action, 425 F. 3d 1116, 1120 (8th Cir. 2005) (parallel reporter citations omitted).

The necessary conflict analysis has not been done here, because the parties have not attempted to carry their settlement-related burden to establish the appropriate choice of law principles. As one court in this jurisdiction has held:

> to render certification of [a] proposed multi-state class action appropriate, plaintiff must credibly demonstrate, through an

extensive analysis of state law variances, that class certification does not present insuperable obstacles.

Adams v. Kansas City Life Ins. Co., 192 F.R.D. 274, 278 (W.D. Mo. 2000) (internal quotations and citations omitted).[20] Plainly, it is the parties' burden—and not the Court's or the objectors'—to make the necessary "credible" demonstration; something they have not attempted to do here. *Id. See also Gariety v. Grant Thornton, LLP,* 368 F.3d 356, 370 (4th Cir. 2004) ("The plaintiffs have the burden of showing that common questions of law predominate, and they cannot meet this burden when the various laws have not been identified and compared."); *Ramthun v. Bryan Career College Inc*., 93 F. Supp. 1011, 1020 (W.D. Ark. 2015) (rejecting class action settlement because "[p]laintiffs have not presented an adequate choice-of-law analysis on all of these causes of action").

The parties may not simply sweep the burden associated with widely disparate state law claims under the rug by the device of removing the most troublesome claims at issue from their operative pleading for the purpose of settlement: "Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002). Based on the release, the parties recognize that all claims that sound in consumer protection, contract, and tort remain implicated in this case. As the initial complaint in this matter demonstrates, there are not just consumer protection claims at issue in a products liability class action; there are also potentially valid claims sounding in tort like negligence and failure to warn, and claims that sound in contract like breach of warranty of merchantability.

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[20] While the Attorneys General will not attempt to take up the parties' burden on choice of law, it appears likely, given that the harms at issue occurred in many states, that Missouri conflict of law principles would result in application of the *lex loci delicti* rule such that the laws of the states where the rifles were sold would apply. *See Dorman v. Emerson, Elec. Co.*, 23 F.3d 1354, 1359 (8th Cir. 1994) ("Missouri law establishes that where it is difficult to see clearly that a particular state has the most significant relationship to an issue, the trial court should apply the *lex loci delicti* rule; that is, it should apply the substantive law of the place where the injury occurred").

Nor can the parties argue that the trial manageability concerns that animated early decisions on choice of law in class actions are not at issue here, because the case is being settled rather than tried. As the Supreme Court made clear in *Amchem*, a disparity in the legal rights of settlement class members precludes certification on adequacy grounds under Rule 23(a)(4) and on predominance grounds under Rule 23(b)(3) even if the case is not to be tried. *Amchem*, 521 U.S. at 622–28.

2. The State Law Differences At Issue In This Case Are Meaningful And Complicated, Requiring Analysis That The Parties Have Failed To Provide.

As discussed above, the objectors and the Attorneys General do not have the burden of establishing jurisdiction-by-jurisdiction differences in the law to defeat class certification. However, even cursory review illustrates the complexity of state law differences.

As the parties have noted, citing cases, Missouri law has significant hurdles for consumer protection claims in products liability cases and may require manifestation of the defect to establish a basis for damages. *See* Joint Supp. Br., ECF NO. 127, p. 23–6. By contrast, in Massachusetts, the consumer protection law unequivocally provides that selling a gun that fails "fundamental requirement of safety and performance" violates the Commonwealth's consumer protection law. *Am. Shooting Sports Council, Inc. v. Att'y Gen.*, 429 Mass. 871, 875 (1999). Massachusetts' highest court went on to state:

> Here, we are in an area where the purchaser is sold a product which the purchaser reasonably believes is safe, if used as directed, and will perform in the manner expected of like products. If, during ordinary use in keeping with directions, the product performs in a deviantly unsafe or unexpected way, the product's sale has occurred in circumstances which make the sale deceptive or unfair. This is especially so where harmful or unexpected risks or dangers inherent

> in the product, or latent performance inadequacies, cannot be detected by the average user or cannot be avoided by adequate disclosures or warnings.

Id. *See also Leardi v. Brown*, 394 Mass. 151, 159–60 (1985) (explaining circumstances in which statutory damages can be awarded for indeterminate but real economic injuries).

Similarly, the law regarding breach of the duty to warn varies across states. For example, class members residing in Maryland may successfully bring an action for their economic losses based upon the history of injury or death associated with the affected rifles. In *Lloyd v. Gen. Motors Corp.*, the Maryland Supreme Court recognized an uninjured class of plaintiffs' ability to sue for economic losses under a products liability theory of recovery and the state's consumer protection act, where there were 38 reported injuries and three deaths associated with the product, but no injuries to class members. *See Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 131 (2007). In other states, the law appears to require that the defect be manifest individually to recover damages. On this issue, the Parties themselves cite *Owens v. GMC*, 533 F.3d 913, 922 (8th Cir. 2008), for the proposition that Missouri law requires manifestation of the defect as a prerequisite to damages.

Moreover, five states have clearly adopted the Third Restatement § 10 on the duty to warn, with different nuances.[21] Other states apply a variety of obligations on sellers depending on the product.[22] These differences mean that class members in some states are potentially being asked to exchange more valuable claims for their release than class members in others.

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[21] *See Jones v. Bowie Indus., Inc.*, 282 P.3d 316, 335 (Alaska 2012) (adopting Restatement § 10 and ordering retrial after jury verdict for defendants); *Sta-Rite Indus., Inc. v. Levey*, 909 So. 2d 901, 905 (Fla. Dist. Ct. App. 2004) (citing Restatement § 10 on the duty to warn); *Lovick v. Wil–Rich*, 588 N.W.2d 688, 695–696 (Iowa 1999) (applying same test as Restatement § 10 to determine liability); *Lewis*, 434 Mass 643, 648–649 (2001) (adopting Restatement § 10); *Liriano v. Hobart Corp.*, 700 N.E.2d 303, 307 (N.Y. 1998) (recognizing post-sale duty to warn and citing Restatement § 10); and *Robinson v. Brandtjen & Kluge, Inc.*, 500 F.3d 691, 697 (8th Cir. 2007) (South Dakota law recognizes a post-sale duty to warn of product defects consistent with Restatement § 10).

[22] *See, e.g.*, *Crowston v. Goodyear Tire & Rubber Co.*, 521 N.W.2d 401, 409 (N.D. 1994) (imposing post-sale duty to warn in "significant 'special' circumstances" where the product defect posed a grave risk of serious injury);

In short, the parties have failed to meet their burden to establish that the class and subclasses are appropriately certified and also have not demonstrated that the settlement benefits are fair to the class members of different states. In these circumstances, the settlement cannot be approved.

V. CONCLUSION

The undersigned state officials support the objectors in this matter and ask that the Court decline to approve the settlement. The issues here require a resolution that provides better notice, more complete relief, a higher claims rate, and clearer limitations on the release—not just for the consumers who have purchased the relevant rifles, but also for the general public. As the Frost objectors and others, including objector Richard Barber, have so eloquently expressed, it is time for Remington to acknowledge responsibility for the harm caused by its defective triggers. The case should be litigated, or the parties should be required to implement a settlement with better notice, more robust remedies that generate a higher claims rate, and a more limited release. In no event should Remington be allowed to continue to argue that its rifles are safe without repair or to issue denials that undermine its duty to warn of the conditions that it knows may cause its triggers to malfunction.

Walton v. Avco Corp., 530 Pa. 568, 578 (Pa. 1992) (imposing post-sale duty to warn where the defective product, in this case a helicopter, is sold in a limited or specialized market); *Sigler v. Am. Honda Mtr. Co.*, 532 F.3d 469, 485 (6th Cir. 2008) (generally noting whether a product is defective due to a lack of adequate warnings varied under Tennessee law based on the complexity of the product at issue and whether consumers could reasonably form expectations about the product's performance); *Jablonski v. Ford Mtr. Co.*, 955 N.E.2d 1138, 1159–60 (Ill. 2011) (Illinois does not recognize a post-sale duty to warn).

Respectfully submitted,

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